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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 619

MANCHESTER BAND OF POMO INDIANS, INC.,

Petitioner,

v.

HON. ALFONSO J. ZIRPOLI, Judge, United States District Court for the Northern District of California,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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The Manchester Band of Pomo Indians, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit denying petitioner a writ of mandamus.

OPINIONS BELOW

The Court of Appeals for the Ninth Circuit denied the writ of mandamus without opinion. A copy of that court's order is Appendix A to this petition.

The District Court order which petitioner sought from the Court of Appeals would have compelled the Hon. Alfonso J. Zirpoli to notify Chief Judge Chambers of the Court of Appeals for the Ninth Circuit that Manchester Band of Pomo Indians, Inc. v. United States of America, et al. (No. 50276 N.D. Cal.) appeared to require the formation of a three judge district court. Such an order was denied by Judge Zirpoli in an order of which Appendix B to this petition is a copy. Judge Zirpoli's order is amplified in a discussion he had with petitioner's counsel. A copy of the reporter's transcript containing that discussion is Appendix C to this petition.

JURISDICTION

The Court of Appeals order denying "Petition for Writ of Mandamus" was entered on June 23, 1969.

This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does 28 U.S.C. §2282 allow a single judge to hear and determine a complaint to enjoin, as unconstitutional racial discrimination against Indians, the operation of federal laws which provide that Government managed Indian trust finds shall receive only four percent simple interest and may be invested in only those bonds issued or guaranteed by the United States and which thereby deny Indians the benefits of other federal laws providing that all Government managed trust funds shall receive at least five percent compound interest and may be invested in certain federal agency bonds

neither issued nor guaranteed by the United States?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Fifth Amendment:

"No person shall be ... deprived of life, liberty, or property without due process of law ..."

31 United States Code §547a:

"All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum."

31 United States Code §725s (the Act of June 26, 1934, c.756, §20, 48 Stat. 1233 as amended):

"(a) The funds appearing on the books of the Government and listed in subsections (b) and (c) of this section shall be classified on the books of the Treasury as trust funds. All moneys accruing to these funds are appropriated and shall be disbursed in compliance with the terms of the trust. Hereafter moneys received by the Government as trustee analogous to the funds named in subsections (b) and (c) of this section, not otherwise herein provided for, except moneys received by the Comptroller of the Currency or the Federal Deposit Insurance Corporation, shall likewise be deposited into the Treasury as trust funds with appropriate title, and

all amounts credited to such trust-fund accounts are appropriated and shall be disbursed in compliance with the terms of the trust...

[b] ...

(20) Indian moneys, proceeds of labor agencies, schools, and so forth...

(67) Miscellaneous trust funds of Indian tribes ..."

The Act of June 25, 1936, c. 814 49 Stat. 1928:

"[S]ection 20 of the Permanent Appropriation Repeal Act, approved June 26, 1934 (48 Stat. 1233), shall not be applicable to funds held in trust for individual Indians, associations of individual Indians, or for Indian corporations chartered under the Act of June 18, 1934 (48 Stat. 984)."

25 United States Code §161a (The Act of Feb. 12, 1929, c. 178, 45 Stat. 1164, as amended):

"All funds with account balances exceeding $500 held in trust by the United States and carried in principal accounts on the books of the Treasury Department to the credit of Indian tribes, upon which interest is not otherwise authorized by law, shall bear simple interest at the rate of 4 per centum per annum."

25 United States Code §162a (The Act of June 24, 1938, c. 648, §1, 52 Stat. 1037):

"The Secretary of the Interior ... may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes,

or other obligations which are unconditionally guaranteed as to both interest and principal by the United States ..."

The following statutes are set out in Appendix D: 12 U.S.C. §§941, 1045, 1435, and 1723c; 16 U.S.C. §831n-4(d).

STATEMENT OF CASE

Since 1938 the United States has been trustee for various sums belonging to the Manchester Band of Pomo Indians. On November 8, 1969, the Band filed a complaint charging the Government with handling those funds in a manner that is unconstitutional, illegal, possibly dishonest, and in violation of the trust relationship. (Manchester Band of Pomo Indians, Inc. v. United States, et al. (No. 50276 N.D. Cal.).) Additional bases for those allegations were provided in an amendment of December 12, 1969. A second amendment, filed March 4, 1969, expanded the complaint's jurisdictional allegations and added the following defendants: David Kennedy as Secretary of the Treasury, Walter Hickel as Secretary of the Interior, Robert Bennett as Commissioner of Indian Affairs, and William Finale as Area Director, Sacramento Area Office, Bureau of Indian Affairs.

Claims 7, 15, and 20 through 29 of the complaint, as amended, raise constitutional challenges to the handling of the Band's funds. [1]

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1. Claims 10 and 18 also assert constitutional defects in the statutes governing investment of Indian trust funds. Those claims allege that deposits in savings and loan (footnote 1. continued on p. 6.)

(Footnote 1. continued.) associations insured by an agency of the United States would have been as safe as deposits in banks insured by an agency of the United States; that the lack of authorization for deposits in savings and loans was therefore arbitrary, in violation of the Fifth Amendment, and in violation of the Government's fiduciary obligations to the Band; that depositing the Band's funds in insured savings and loan associations would have yielded additional income to the Band; and that therefore the Government's failure to deposit the Band's funds in Government insured savings and loan associations was a breach of the Government's trust obligations. However, the constitutional questions presented by claims 10 and 18 cannot be resolved by enjoining the enforcement, operation, or execution of a federal statute and so do not bear on the need to convene a three judge court.

Claims 1 through 6, 8, 9, 11 through 14, 16, 17, 19, 30, and 31 raise no constitutional issues. Claims 1 through 6 and 14 assert that despite a law requiring the payment of four percent interest on Indian trust funds (25 U.S.C. §161a), the Government paid no interest or less than four percent interest on the Band's funds. Claims 8, 11, 16, 19, 30, and 31 allege that the Government breached its trust obligations by not utilizing laws that authorize the investment of Indian trust funds in insured banks and in bonds issued or guaranteed by the United States (24 U.S.C. §§151, 162a), when investments in insured banks (claims 8, 16) or in bonds issued by the Government (claims 11, 19) or guaranteed by the Government (claims 30,31) (footnote 1. continued on p. 7.)

Claims 7 and 15 are based on the interrelationship between 25 U.S.C. §161a, 31 U.S.C. §§547a and 725s, and the Act of June 25, 1936, c. 814 (49 Stat. 1928).

In claim 15 the Band contends that it was and is entitled to the benefits 31 U.S.C. §547a, and that 25 U.S.C. §161a, by providing for Indian trust funds in the Treasury to receive four percent simple interest rather than the minimum of five percent compound interest that 31 U.S.C. §547a requires for all Government managed trust funds [2], denied and denies Indians equal protection solely on the basis of their race, violates the Fifth Amendment, and is unconstitutional. To prevent the assertion that 39 Stat. 1928 together will 31 U.S.C. §725s, denies Indian trust funds the status of trust funds under 31 U.S.C. 547a the Band alleges in the alternative that 31 U.S.C. §725s, as amended by 49 Stat. 1928, does not modify 31 U.S.C. §547a or that 49 Stat. 1928 deprives Indians of the benefits of 31 U.S.C. §547a

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(footnote 1. continued) would have produced higher returns. Claims 9 and 17 assert that the United States breached its trust obligations, even in the absence of statutory authorization, by failing to invest the Band's funds in government insured bank deposits. Claim 12 sets out the Government's breach of fiduciary duty in failing to promptly credit the Band with $500 of rent money collected for the Band; and claim 13 relates the Government's failure to ever credit the Band with $850 of rent money.

2. Examples of such trust funds are (1) Pension money, Saint Elizabeths Hospital (31 U.S.C.§725s(b)(15), (2) Personal funds of patients, Saint Elizabeths Hospital (31 U.S.C. §725s(b)(16)), (3) Funds of Federal Prisoners (31 U.S.C.§725s(b)(21), and (4) Funds due Incompetent Beneficiaries, Veterans' Administration (31 U.S.C.§725s(b)(74)).

solely on the basis of race and is therefore an unconstitutional denial of equal protection.

Claim 7 is the same as claim 15 except that claim 7 alleges that as to Indian funds held by the Bureau of Indian Affairs rather than the Treasury, 25 U.S.C. §161a, which purports to deal only with funds in the Treasury, may be inapplicable rather than unconstitutional.

Claims 20 through 29 also involve the relationship between certain statutes. 12 U.S.C. §§941, 1045, 1435, and 1723c and 16 U.S.C. §831-4(d) make certain federal agency bonds lawful investments for all trust funds managed by the United States, even though the bonds are not issued or guaranteed by the United States. 25 U.S.C. §162a only authorizes investment of Indian trust funds in bonds issued or guaranteed by the United States. The Band alleges that the Government breached its fiduciary duty by not investing in the bonds described in 12 U.S.C. §§941, 1045, 1435, and 1723c and 16 U.S.C. §831n-4(d), because those bonds would have yielded more income to the Band and, in the alternative, 25 U.S.C. §162a does not implicitly prohibit investment of Indian trust funds in such bonds by only authorizing investments in bonds issued or guaranteed by the United States or 25 U.S.C. §162a violates the Fifth Amendment by denying Indians the benefits all other beneficiaries enjoy under 12 U.S.C. §§941, 1045, 1435, and 1723c and 16 U.S.C. §831--4(d).

The complaint prays for a $5750 judgment against the United States to rectify past injustices. An accounting is sought as incidental

relief, because the Government has failed to deliver a promised accounting for the period from 1938 to 1946.

To prevent future injustice the complaint asks the Court to declare the limits placed on defendants' conduct by the Consiitution, statutes, and the trust relationship. To insure that the individual defendants remain within the limits set by the Court, the complaint seeks an injunction, punishable by contempt, that will (1) enjoin the individual defendants from retaining funds in the Treasury or the BIA and paying interest pursuant to 25 U.S.C. §161a when funds should be invested pursuant to 31 U.S.C. §547a, (2) enjoin the operation of the Act of June 25, 1936, c.814 (49 Stat. 1928), and (3) enjoin the individual defendants from using 25 U.S.C. §162a as a basis for denying Indians the benefits of 12 U.S.C. §§941, 1045, 1435, and 1723c and 16 U.S.C.§831n-4(d)

Because the Band seeks to enjoin the operation and/or execution of two federal statutes (25 U.S.C. §161a; the Act of June 25, 1936, c.814 (49 Stat. 1928)) and part of a third (25 U.S.C. §162a) on constitutional grounds, paragraph 1 of the complaint states that the case must be heard by a three judge court.[3] However, Judge Alfonso J. Zirpoli

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3. 28 U.S.C. §1337, 1361, and 1362 give the District Court jurisdiction to enjoin individual government officers from executing or operating under the statutes challenged by the Band. (See sections II(D) and II(E) of the Petition for Writ of Mandamus, which is part of the certified record.)

28 U.S.C. §1346(a)(2) gives the District Court jurisdiction of the damage claim against the United States.

ruled on March 24, 1969, that "this case in its present posture does not come within the purview of Section 2282 of Title 28, United States Code" and that "the Complaint fails to present a substantial constitutional question justifying the convening of a Court of three judges."

The following colloquy then took place between Mr. Sclar, counsel for plaintiff, and Judge Zirpoli:

"MR. SCLAR: Your Honor, could I just get some clarification. Is the basis for your order that the discrimination involved here doesn't raise a constitutional question?

"THE COURT: Yes.

"MR. SCLAR: On the basis that the discrimination between Indians and all others is not a racial discrimination?

"THE COURT: Because the--my ruling is that it wasn't based upon any--there's nothing in the statute or the regulation which is based upon racial considerations as such. I mean, you had a peculiar position with the Indians, you had your treaties,[4] you had all

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4. Between 1851 and 1853 three Government agents negotiated 18 treaties with the California Indians. By these treaties the Indians agreed to surrender most of their land. However after the Indians surrendered their land, the Senate refused to ratify the treaties. Thus, the "treaties" would not seem to support the constitutionality of the challenged statutes.

your problems, the Indians becoming wards of the Government, everything that happened there, but I don't think that the question of the investment of the funds and the manner of investment is based upon racial grounds, and therefore I've entered this-- I will enter this order, I'll offer it to the Government, and the order will be entered, and I would suggest that the parties proceed to prepare this case for disposition in trial."

On May 22, 1969, petitioners sought the previously described writ of mandamus from the Ninth Circuit Court of Appeals.5 The Government filed a Memorandum for Respondent in Opposition; and on June 23, 1969, the Court of Appeals denied the Petition for Writ of Mandamus without opinion.

REASONS FOR GRANTING THE WRIT

The federal government holds millions of dollars in trust for Indian tribes. Those tribes cannot use that money for most purposes without Congress' permission. (25 U.S.C. §§123 123b.) Nor can those tribes determine how their funds are to be invested.

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5. The non-three-judge-court-claims in the complaint (see footnote 1) precluded petitioners from treating the District Court's order as an appealable dismissal of the case. (Compare Idlewild Liquor Corp. v. Epstein, 370 U.S. 713, 715, fn.2 (1962).) Petitioners accordingly sought a writ of mandamus from the Court of Appeals. (Reed Enterprises v. Corcoran. 354 F.2d 519, 524 (D.C. Cir.1965); Svejkovsky v. Tamm, 326 F.2d 657 (D.C.Cir. 1963); Borden Company v. Liddy, 309 F.2d 871, 877 (8th Cir,1962); cf. Shackman v. Arnebergh, 387 U.S. 427 (1967).)

That is done by the Secretary of the Interior (25 U.S.C. §§151-165), who may even loan the money to the United States (25 U.S.C. §§161a, 162a).

The District Court nevertheless decided that it lacks power to end the statutory scheme of discrimination against such tribal trust funds described in the STATEMENT OF THE CASE. It ruled that the discrimination was permissible because it was based on history rather than race; and the Court of Appeals apparently agreed.

This Court must reverse those decisions. They are inconsistent with this Court's decisions holding that tradition does not authorize the federal government to perpetuate racial discrimination (Bolling v. Sharpe, 347 U.S. 497 (1954)) and that race is not a legitimate criteria for dispensing the benefits of government managed trust funds (Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957)). The decisions below legally sanctify second class status for every beneficiary of a Government managed Indian trust fund.

28 U.S.C. §2282 REQUIRES A THREE JUDGE DISTRICT COURT TO HEAR AND DETERMINE A COMPLAINT TO ENJOIN, AS UNCONSTITUTIONAL RACIAL DISCRIMINATION AGAINST INDIANS, THE OPERATION OF FEDERAL LAWS WHICH PROVIDE THAT GOVERNMENT MANAGED INDIAN TRUST FUNDS SHALL RECEIVE ONLY FOUR PERCENT SIMPLE INTEREST ANY MAY BE INVESTED IN ONLY THOSE BONDS ISSUED OR GUARANTEED BY THE UNITED STATES AND WHICH THEREBY DENY INDIANS THE BENEFITS OF OTHER FEDERAL LAWS PROVIDING THAT ALL GOVERNMENT MANAGED

TRUST FINDS SHALL RECEIVE AT LEAST FIVE PERCENT COMPOUND INTEREST AND MAY BE INVESTED IN CERTAIN FEDERAL AGENCY BONDS NEITHER ISSUED NOR GUARANTEED BY THE UNITED STATES.

A. THE CLAIM THAT FEDERAL LAWS ARE RACIALLY DISCRIMINATORY AGAINST INDIANS" TRUST FUNDS, AS CONTRASTED TO ALL OTHER TRUST FINDS MANAGED BY THE GOVERNMENT, PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION.

28 U.S.C. §2282 requires that a three judge court hear and determine an action to enjoin the enforcement, operation, or execuation of an Act of Congress on the ground that the statute is unconstitutional. Case law adds that the constitutional challenge must be substantial, i.e., not obviously without merit or foreclosed by prior decisions. (Water Service Co. v. Redding, 304 U.S. 252 (1938).)

No case can be cited to sustain the constitutionality of a law providing that Indian's trust funds may be left in the Treasury at four percent simple interest while another federal law provides that all trust funds managed by the government shall receive at least five percent compound interest. Likewise, no decision sanctions one law restricting Indian trust funds to only those bonds issued or guaranteed by the United States when another law authorizes the investment of all trust funds managed by the government in federal agency bonds that are neither issued nor guaranteed by the United States.

On the contrary, case law strongly suggests the unconstitutionality of federal statutes discriminating against only those Government managed trust funds for which Indians are the beneficiaries.

"Discrimination based on racial differences can have no proper legislative purpose and so offends the Due Process Clause of the Fifth Amendment." (Boylan v. United States, 310 F.2d 493, 500 (1962), cert. denied 372 U.S. 935; see also Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U.S. 714, 721 (1963); Bolling v. Sharpe, supra, 347 U.S. 497; Mitchell v. Boys Club of Metropolitan Police, D.C., 157 F.Supp. 101, 102 (D.C. 1957).) This rule applies to legislation and other governmental action affecting the management of trust funds. (Pennsylvania v. Board of Trusts, supra, 353 U.S. 230; Evans v. Newton 382 U.S. 296, 298-299 (1966).)

Petitioner recognizes, of course, that the Constitution does not require Congress to be color blind in dealing with Indians. (Board of Commissioners v. Seber, 318 U.S. 705, 715-718 (1943); Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (E.D. Wash. 1965), affd. without opinion 384 U.S. 209.) As this Court said when it upheld Congressional discrimination in favor of Indians:

"From almost the beginning, the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. Cf. Worcester v. Georgia, 6 Pet. 515. This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the

exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the body politic." (Seber, supra, at 715.)

Congressional power to discriminate in favor of Indians does not justify discrimination against Indians, however. Past injustices are not constitutional authority for new and different injustices. To the contrary, federal laws affecting Indian tribes must not violate constitutional prohibitions.[6] (Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899); Crain v. First National Bank of Oregon, Portland, 206 F. Supp. 783, 788 (Ore. 1962) affd. 324 F.2d 532 (9th Cir. 1963).) The Fifth Amendment protects Indians, like all others, against federal laws that deny due process or equal protection. (82 Harv. L. Rev. 697, 700, fn. 17 (1969); Kane, The Negro and the Indian: A Comparison of Their Constitutional Rights, 7 Ariz. L. Rev. 244, 248 (1966); see Perrin v. United States, 232 U.S.478, 486 (1914).) A statute applying only to Indians

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6. The Manchester Band is entitled to due process and equal protection of the laws even though it is a corporation. (Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).)

violates the Fifth Amendment unless the Government can demonstrate a compelling need for it (21 Stan L. Rev. 1236, 1244 (1969); 82 Harv. L. Rev, supra, at 701, 702) or the statute has a benign purpose such as preserving Indian culture (21 Stan L. Rev., supra, at 1247; see Baker v Carr, 369 U.S. 186, 215-217 (1962); Simmons v Eagle Seelatsee, 244 F. Supp. 808)[7]

Neither of those rationales are applicable to the laws petitioner challenges. Five percent compound interest provides a 282 percent greater return than four percent simple interest over a fifty year period. The statutes which relegate Indians to the lower amount are obviously not benign. Neither, so far as the government has shown, is the law that prevents Indian trust funds from being invested in bonds that are legal investments for all other government trust funds. No evidence whatsoever has been produced on the size of other trust funds, the wealth of other trust funds' benificiaries, or any other factor that would make those bonds more dangerous investments for Indians than for other classes of beneficiaries.

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7. The Government contended before the Court of Appeals that Indians could be paid discriminatorily low rates of interest because the Constitution does not require the payment of any interest on Government managed trust funds. (Memorandum for Respondent in Oppostion at 4.) Any viability which that contention may have had was ended by the decision in Shapiro v. Thompson 394 U.S. 618 (1969).

The Government has also failed to show any legitimate need, let alone a compelling one, for discriminating against Indians. Saving the Government money is not a legal justification for statutes which create an otherwise unconstitutional classification. (Shapiro v Thompson, supra, 394 US at 633).

Congress' plenary power over Indians (Simmons v. Eagle Seelatsee, 244 F. Supp. 803, 813 (E.D. Wash. 1965), affd. without opinion 384 U.S. 209) does not sanction these discriminatory and arbitrary statutes either. The federal government has plenary power in the field of foreign relations, and pursuant to that power Congress may pass expatriation laws (Schneider v. Rusk, 377 U.S. 163, 167-168 (1964)),but Congress may not pass expatriation statutes that deny equal protection of the laws (Id. at 168-169). Congress' plenary power over Indians is similarly subject to constitutional limitations. (21 Stan. L. Rev., supra, at 1247-48.)

Finally, Cherokee Nation v. United States, 270 U.S. 476 (1926) is not contrary to the views expressed above. In that case the Cherokees unsuccessfully tried to claim the benefit of 31 U.S.C. §547a. The Court held that the Cherokees could not invoke section 547a because the Cherokees and the United States had an agreement providing for only five percent simple interest and because the Cherokees had ratified an accounting that did not provide for five percent compound interest. (Id. at 492) [8] No equal protection arguments were made.

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8. Two (footnote 8 continued on page 18)

(footnote 8 continued.) other cases also refer to what is now 31 U.S.C. §547a.

In United States v Blackfeather, 155 U.S. 180 (1894) the statute is mentioned but not invoked. The statute was not material because of a treaty providing for five percent interest.

Angarica v Bayard, 127 U.S. 251 (1888), involved an agreement between Spain and the United States for arbitration of certain claims against Spain by United States citizens. The citizens were not parites, however, and the United States was treated as the person entitled to claim. The United States received $748,000 because of Angarica's claim and gave all but $41,000 to Angarica. The $41,000 was kept to pay the arbitration expenses in the event Spain breached its agreement to pay them. After eight years Bayard, the Secretary of State, finally paid Angarica the $41,000 but without any interest. Angarica sued for five percent compound interest under the predecessor to section 547a. The United States said it was not liable because, among other things, (1) 547a does not say who is the beneficiary of the five percent interest and so Congress must decide who gets it and (2) the $41,000 was paid to the United States as claimant not as trustee for Angarica. (Id. at 257-258.) The Supreme Court held that the United States was paid as claimant rather than trustee, so Angarica's only claim was for unlawful detention of money; and the United States is not liable for interest on the unlawful detention of money. Nothing was said about the Government's preposterous argument that section 547a has no beneficiary because none is expressly provided.

B. THE CONSTITUTIONALITY OF STATUTES THAT DISCRIMINATE AGAINST INDIAN BENIFICIARIES OF GOVERNMENT MANAGED TRUST FUNDS IS A JUSTICIABLE QUESTION.

A claim is generally justiciable if "the duty asserted can be judicially identified and its breach judicially determined" and if "protection for the right asserted can be judicially molded." (Baker v Carr, supra, 369 U.S. at 198; Powell v McCormack, 395 U.S. 486, 517 (1969).)

The duty asserted in this case is to refrain from racial discrimination. At least since Brown v Board of Education, 349 U.S. 294 (1955), that duty and its breach have been considered subject to judicial determination and remedy. This case presents no special problems. The remedy for the unconstitutional statutes is to declare them unconstitutional and enjoin the individual defendants from acting pursuant to them.

Nor does this case present a "political question." "[O]n the surface of any case held to involve a political question is found a texually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality

of embarrassment from multifarious pronouncements by various departments on one question." (Baker v. Carr, supra, 369 U.S. at 217; Powell v McCormack, supra, 395 U.S. at 518-519.)

Those issues are not presented by this case. The Constitutional commitment of Indian affairs to Congress is no greater than the Constitutional commitment of the power to regulate commerce (U.S. Const., Art I, §8). The existence of manageable standards for resolving the case has been shown above. The case does not call for an initial policy determination of a kind clearly for non-judicial discretion. As previously pointed out, this is a standard discrimination case, and the Manchester Band merely wishes the benefit of existing statutes which apply to non-Indain beneficiaries of Government managed trusts.

A decision in favor of the Band would not show a lack of due respect for Congress (Powell v McCormack, supra, 395 U.S. at 548-549); nor would it create the potential for conflicting pronouncements from Congress and the Court, since this Court is the final arbiter of a statute's constitutionality (Id. at 549). Finally, this is not a case of unusual need for unquestioning adherence to a political decision already made. The statutes controlling Indian trust funds are not political decisions, except in the sense that all laws are political. Moreover, unquestioning adherence to those statutes seems no more necessary than unquestioning adherence to any other statues that discriminatorily apply to only one race. Congress is not immune from judicial scrutiny whenever Indians are involved.

(Baker v Carr, supra, 369 U.S. at 216; Perrin v United States, supra, 232 U.S. at 486.)

Broad language in Lone Wolf v. Hitchcock 187 U.S. 553, 565 (1903), could be read as denying courts authority to take any case involving a controversy between Indians and the Government respecting Congressional power to administer Indian property. Such a reading of Lone Wolf is erroneous for two reasons, however. First, the complaint in Lone Wolf was dismissed only after the Court found the challenged Congressional action to be constitutional. Thus Lone Wolf implicitly recognized what Baker v Carr, supra, 369 U.S. at 215, fn. 43 and 216, made explicit -- that a complaint challenging the constitutionality of a federal statute dealing with Indians is justiciable if it arises in a costomary legal context. Second, Lone Wolf was decided many years before the standards for a political question were formulated[9] in Baker v Carr and Powell v McCormack.

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9. The District Court's order does not purport to rest on any procedural defect, and the Respondent's memorandum to the Court of Appeals asserted noneother than lack of justiciability. However, the Government contended in the District Court that the court lacked jurisdiction, that the individual defendants were immune from suit, that the complaint did not seek to enjoin the enforcement, operation or execution of an act of Congress, and that the case did not require a three judge court because some claims raised only nonconstitutional issues (footnote 9 continued on p. 22)

CONCLUSION

The laws challenged in this case single out one race -- Indians -- for inferior treatment by the Government. The respondent defends those laws on the ground that Indians have always been in a "peculiar position" vis a vis the Government; but a history of conquest and deprivation does not justify invidious discrimination. The petition should be granted and respondent should be ordered to notify Chief Judge Chambers that Manchester Band of Pomo Indians, Inc. v United States, et al. requires the formation of a three Judge district court.

Respectfully submitted,

GEORGE F. DUKE
RICHARD B. COLLINS, JR.
LEE J. SCLAR
California Indian Legal Services

by GEORGE FRANKLYN DUKE
George F. Duke
Attorneys for Petitioners

(footnote 9 continued) and most claims could be resolved on non-constitutional grounds. A summary of petitioner's answer to those contentions may be found in sections I (B) through I (E) of Petitioner's Petition for Writ of Mandamus, a copy of which is part of the certified record.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MANCHESTER BAND OF POMO INDIANS, INC., Petitioner, v. HON. ALFONSO J. ZIRPOLI, Judge, United States District Court for the Northern District of California, Respondent.	)	No. 24,318 O R D E R

Before: BROWNING and DUNIWAY, Circuit Judges

The petition for writ of mandamus is denied.

/s/ James R. Browning

/s/ Ben C. Duniway
United States Circuit Judges

APPENDIX B

CECIL F. POOLE
United States Attorney
DAVID E. GOLAY
Assistant U.S. Attorney
16th Floor Federal Building
450 Golden Gate Avenue
San Francisco, California - 94102

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
IN AND FOR
THE NORTHERN DISTRICT OF CALIFORNIA

MANCHESTER BANK OF POMO INDIANS, INC., Plaintiff vs. UNITED STATES OF AMERICA, et al, Defendants	CIVIL NO. 50276

ORDER DENYING APPLICATION FOR A THREE-JUDGE COURT, TITLE 28 U.S.C., 2282

This cause having come before the Law and Motion Department of this Court on March 24, 1969, and the Court having

considered the arguments of counsel, oral and written;

And this Court having determined that this case in its present posture does not come within the purview of Section 2282 of Title 28, United States Code; and this Court having further found that the Complaint fails to present a substantial constitutional question justifying the convening of a Court of three judges;

IT IS ORDERED that the motion to convene a Court composed of three judges be, and the same is hereby DENIED.

DATED: March 24, 1969.

/s/ Alfonso J. Zirpoli
JUDGE, United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before: Hon. Alfonso J. Zirpoli, Judge

MANCHESTER BAND OF POMO INDIANS, INC., Plaintiff, vs. UNITED STATES OF AMERICA, et al., Defendants.	No. 50276

A P P E A R A N C E S:

For Plaintiff: LEE J. SCLAR, ESQ.

For Defendants: DAVID E. GOLAY, ESQ.
Asst. United States Attorney

REPORTER'S TRANSCRIPT

March 24, 1969

March 24, 1969 - Monday

THE CLERK: 50276, Manchester Band of Pomo Indians vs. United States, motion for a three-judge court.

Counsel will state their appearances for the record.

MR. SCLAR: I'm Lee Sclar, S-c-l-a-r, California Indian Legal Services, for the Band.

MR. GOLAY: David Golay, Assistant United States Attorney, for all defendants.

Mr. SCLAR: Your Honor, I have just a few things I'd like to say, unless the Court would like to ask some questions.

The first thing that I'd like to point out is that the Government and the defendant, individual defendants, have alleged that the discrimination in this case is relatively minor. I'd like to point out just as an example that the difference between 4 percent simple interest and 5 percent --

THE COURT: They're not talking about -- they're talking about racial -- the claim or racial discrimination .

MR. SCLAR: I understand, but the --

THE COURT: And which to me, it seems the position of the Government seems to be very well taken. I think it's a kind of a ridiculous argument here. I'm not passing on the merits of your case

now, because you may have a very meritorious case.

MR. SCLAR: Well, it's racial discrimination, Your Honor --

THE COURT: The question is whether this calls for a three-judge court. That's another question. That's all I'm -- all I have before me.

MR. SCLAR: Well, I understand that, Your Honor, but as to the substantiality of the Federal question, our allegation is that there's racial discrimination here.

THE COURT: I'm not impressed with that argument.

MR. SCLAR: Well, the basis for it is that the Indian trust funds managed by the Government are treated differently from every other trust fund managed by the Government, and the result is very substantially detrimental to the Indians, and it seems to me that that's racial discrimination.

THE COURT: Maybe that's an injustice that the Court ought to correct, but it's not a three-judge question, that's the point I make and the ruling that I'm going to give you. I've gone over your briefs, I've gone over this thing in detail, and the Court is of the view that this case does not in its present posture come within the purview of 2282 of Title 28, and further, the Court finds that the complaint fails to present a substantial constitutional question justifying the convening of a Court of three judges.

And therefore the motion to convene a Court composed of three judges is denied

That doesn't mean that the Court will not go ahead and hear your case. Of course it will. It may very well be that the injustice that you've complained about exists, and it's one that should be corrected, and I think the Government ought to give some serious consideration as to what can and should be done.

MR. SCLAR: Your Honor --

THE COURT: Done voluntarily by the Government, without the need of a Court order.

MR. SCLAR: Your Honor, could I just get some clarification. Is the basis for your order that the discrimination involved here doesn't raise a constitutional question?

THE COURT: Yes.

MR. SCLAR: On the basis that the discrimination between Indians and all others is not a racial discrimination?

THE COURT: Because the -- my ruling is that it wasn't based upon any -- there's nothing in the statute or the regulation which is based upon racial considerations as such. I mean, you had a peculiar position with the Indians, you had your treaties, you had all your problems, the Indians becoming wards of the Government, everything that happened there, but

I don't think that the question of the investment of the funds and the manner of investment is based upon racial grounds, and therefore I've entered this -- I will enter this order, I'll offer it to the Government, and the order will be entered, and I would suggest that the parties proceed to prepare this case for disposition in trial. Unless the Government is so cognizant of this situation that it's prepared to take remedial measures.

MR. SCLAR: Well, I think, Your Honor, it would require legislation on the part of Congress to correct this situation, because what would be involved would be either repal or modification of the statutes that deal only with Indians, to their detriment.

THE COURT: Well, it may be that this step of yours will be sufficient to cause the Department of Interior to submit appropriate legislation, with the approval of the administration and the Congress of the United States. I don't know. We'll see what happens.

All right.

APPENDIX D

12 United States Code §941 (The Act of July 17, 1916, c.245, §27, 39 Stat. 380):

"Farm-loan bonds issued under the provisions of this chapter by Federal land banks or joint-stock land banks shall be a lawful investment for all fiduciary and trust funds, and may be accepted as security for all public deposits."

12 United States Code §1045 (The Act of July 17, 1916, c.245 Title II, §203 (e), as added June 3, 1935, c.164, §6 (b), 49 Stat. 316, as amended):

"All debentures or other similar obligations issued by Federal intermediate credit banks shall be lawful investments, and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or of any officer or officers thereof."

12 United States Code §1435 (The Act of July 22, 1932, c.522, §15, 47 Stat. 736):

"Obligations of the Federal Home Loan Banks issued with the approval of the board under this chapter shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof..."

12 United States Code §1723c (The Act of June 27, 1934, c.847, Title III, §311, as added August 2, 1954, c.649, Title II, §201, 68 Stat. 622, as amended):

"All obligations, participations, or other instruments issued by either of the bodies corporate named in section 1717 (a) (2) of this title shall be lawful investments, and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority and control of the United States or any officer or officers thereof..."

16 United States Code §831n-4(d):

"Bonds issued by the corporation hereunder shall be lawful investments and may be accepted as security for all fiduciary trusts and public funds the investment or deposit of which shall be under the authority or control of any officer or agency of the United States..."

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 619

MANCHESTER BAND OF POMO INDIANS, INC.,
PETITIONER

v.

HON. ALFONSO J. ZIRPOLI, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals did not write an opinion. Its order denying the petition for a writ of mandamus appears at Pet. App. A. The order of the district court appears at Pet. App. B.

JURISDICTION

The order of the court of appeals was entered on June 23, 1969. The petition for a writ of certiorari

was filed on September 19, 1969. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a single district judge correctly concluded that the special provisions of federal law governing the investment of Indian trust funds raise no substantial issues of equal protection of the laws as would require the convening of a three-judge district court.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent provisions of the Fifth Amendment to the Constitution and the relevant statutes are set forth in the Petition at pages 3-5 and App. D.

STATEMENT

This matter arises out of the order of the Court of Appeals for the Ninth Circuit denying a petition for a writ of mandamus to require Honorable Alfonso J. Zirpoli to convene a three-judge district court pursuant to 28 U.S.C. 2282, 2284. The application for a three-judge court was filed in connection with a suit by the Tribe against the United States of America, the Secretaries of the Interior and Treasury, and officers of the Bureau of Indian Affairs for injunctive and money relief. Petitioner asserts (Pet. 5-9) that 25 U.S.C. 161a, which provides that Indian trust funds in the Treasury receive 4% simple interest, and 25 U.S.C. 162a, which limits such in-

vestments to bonds issued or guaranteed by the United States, are unconstitutional in that they deny the Indians the benefits of other federal laws under which government-managed trust funds receive at least 5% compound interest from investments which may include certain federal agency bonds neither issued nor guaranteed by the United States. This differing treatment, petitioner alleges (Pet. 9), amounts to an unconstitutional racial discrimination against Indians.

ARGUMENT

The decision of the court of appeals is plainly correct and does not conflict with the controlling decisions of this Court or the decisions of any court of appeals. Accordingly, there is no occasion for further review.

1. A three-judge court need be convoked only where the constitutional question posed is substantial. As this Court stated in *Bailey* v. *Patterson*, 369 U.S. 31, 33, such a court is not required "when the claim that a statute is unconstitutional is wholly unsubstantial, legally speaking nonexistent. * * *"

2. The different treatment by Congress of Indian trust funds compared with other trust funds does not constitute a forbidden racial discrimination. The suggestion that it does rests on the premise that statutes designating and treating Indians as a special class are constitutionally arbitrary. But class legislation affecting Indians, as distinct from class legislation affecting Negroes, Chinese, and Jews, is a settled feature both of the federal constitution and of federal

laws. Thus, Congress is explicitly given the power to regulate "Commerce * * * with the Indian tribes," Const. Art. I, Sec. 8, cl. 3, a power which readily comprehends the fixing of interest on tribal funds in the government's trust. The whole of Title 25 of the United States Code demonstrates a congressional recognition that class legislation discriminating between Indians and others is constitutionally appropriate. This conscious and deliberate congressional policy toward the Indians is not proscribed racial discrimination, but an exercise of plenary authority not subject to judicial control. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565. As a three-judge district court stated in rejecting a similar contention recently:

> * * * if legislation is to deal with Indians at all, the very reference to them implies the use of "a criterion of race". Indians can only be defined by their race.

Simmons v. *Eagle Seelatsee*, 244 F.Supp. 808, 814 (E.D. Wash.), affirmed, 384 U.S. 209. That reference, in the case of Indians, does not establish that forbidden racial discrimination has occurred.

In particular, it is clear that Congress had no forbidden discriminatory purpose when in 1929, 45 Stat. 1164, and then again in 1930, 46 Stat. 584, it enacted the four percent interest provision of which petitioner particularly complains. Whether a correct reading of existing law or not, the then current understanding, of which Congress was aware, was that Indians were due *no* interest on their trust funds deposited in the Treasury unless treaties specifically provided for it. H.Rep. No. 2320, 70th Cong., 2d

Sess.; S. Rep. No. 1396, S. 5180, 70th Cong., 2d Sess. (1929). There is no constitutional obligation to pay interest on trust funds; accordingly, the congressional decision to pay interest at four percent, viewed in the light of the information before it about the existing state of the law, was entirely consistent with its obligations under the Fifth Amendment. *Board of Commissioners* v. *Seber*, 318 U.S. 705, 715-718. In any event, the 1929 and 1930 acts, now embodied in 25 U.S.C. 161a, leave open the possibility of a higher rate of interest if "otherwise authorized by law."

Whether five percent compound interest is in fact still authorized by law is a more difficult question than might appear from the face of what is now 31 U.S.C. 547a. That provision was enacted in 1841, 5 Stat. 465; in 1880, Congress passed a statute specifically relating to Indian trust funds and providing that they should earn interest at the rate "stipulated by treaties or prescribed by law." 21 Stat. 70. This Act was then treated as abrogating the general five percent requirement of 5 Stat. 465, and we understand the five percent provision to have had no use since. Whether that was a correct reading of the 1880 Act's effect, or indeed whether *that* statute, not here sought to be enjoined, was constitutional, are not questions which require the convening of a three judge district court, however. They may be tried out on the merits of petitioner's complaint before the single judge before whom that complaint is now pending.[1]

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[1] Section 162a of Title 25, U.S.C., the other provision petitioner seeks, in part, to enjoin, is entirely permissive and

The constitutional challenges to the acts whose enforcement petitioner seeks to enjoin are insubstantial. It follows that the request to convene a three-judge district court was properly denied. *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, 255.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

EDMUND B. CLARK,
JACQUES B. GELIN,
Attorneys.

OCTOBER 1969

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again subject to the condition that the interest rates obtained in the manner provided must at least equal those which the United States is "obligated by law to pay." Careless handling of Indian funds and resultant losses in earlier years, rather than any discriminatory purpose, was the obvious motivating factor of this enactment.

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